

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Montgomery County Behavioral Health/Development Disabilities,	:	
	:	
	:	
Petitioner	:	
	:	
v.	:	No. 851 C.D. 2014
	:	
State Civil Service Commission (Oyetayo),	:	Submitted: November 7, 2014
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: February 11, 2015

The Montgomery County Behavioral Health/Development Disabilities (Appointing Authority) petitions for review of the Order of the State Civil Service Commission (Commission) that set aside Appointing Authority’s removal of Gbenga A. Oyetayo and, instead, imposed a ten-day suspension and reinstated Mr. Oyetayo with no back pay.¹ On appeal, Appointing Authority argues that the

¹ By Memorandum Opinion and Order filed July 7, 2014, this Court denied Appointing Authority’s Request for Supersedeas/Stay of State Civil Service Adjudication. Montgomery
(Continued...)

Commission abused its discretion and/or erred as a matter of law by finding that Appointing Authority did not have just cause for removal and by modifying the discipline imposed by Appointing Authority. Discerning no abuse of discretion or error of law, we affirm.

Mr. Oyetayo began his employment with Montgomery County Aging and Adult Services in February 2002 as a Fiscal Technician. (Adjudication, Findings of Fact (FOF) ¶ 3.) In August 2007, Mr. Oyetayo became employed by Appointing Authority as an Accountant I. (FOF ¶ 4.) Mr. Oyetayo and his family also own a business known as Marjoy Travels. (FOF ¶ 31.)

Appointing Authority had an Employee Handbook which described “acceptable use” of the Appointing Authority’s electronic resources.² (FOF ¶ 12.)

County Behavioral Health/Development Disabilities v. State Civil Service Commission (Oyetayo) (Pa. Cmwlth., No. 851 C.D. 2014, filed July 17, 2014) (single judge op.).

² This policy states:

This policy defines the boundaries of “acceptable use” of the [Appointing Authority’s] computers, networks, electronic mail services, and electronic information systems . . . collectively referred to as the [Appointing Authority’s] “electronic resources.” It includes by reference a self-contained compilation of specific rules that can be modified as the electronic information environment evolves.

The policy is based on the principle that the electronic information environment is provided to support [Appointing Authority] business and its mission. Other uses are secondary Employees may not use the resources of their office or employment in aid of or to conduct political or personal activities.

The County has the right to monitor any and all of its electronic resources.

(Continued...)

The Appointing Authority’s policy does permit employees to use the electronic resources “in a minimal manner for non-county matters during their lunch hour and before or after their work hours.” (FOF ¶ 13.) Between March 17, 2008 and February 1, 2013, Appointing Authority issued three written warnings to Mr. Oyetayo: (1) on March 17, 2008 for “Abuse of Time” because of a late call off on March 12, 2008, and the warning indicated that Mr. Oyetayo was “expected to efficiently utilize [his] time during work hours” and that “his personal phone calls should be infrequent and limited to necessity”; (2) on May 26, 2011 for “Use of Office Equipment” for using a “scanner for a non-work related document;” and (3) on February 1, 2013, Mr. Oyetayo was given a written warning and performance improvement plan indicating that he was to “[g]reatly reduce[his] personal phone calls,” and was not to “use . . . [Appointing Authority] office equipment for personal needs.” (FOF ¶¶ 14-16 (internal quotation marks omitted).)

On May 20, 2013, Montgomery County’s Chief Operating Officer (COO) received a message from Mr. Oyetayo’s work email address with the subject line

...

Prohibited Uses

Sending, displaying, circulating, or storing inappropriate, illegal, or sexually explicit material is prohibited.

The policy defines the penalties for infractions, up to and including loss of system access and termination of employment. In addition some activities may lead to risk of legal liability, both civil and criminal

(FOF ¶ 12.)

“Love.”³ (FOF ¶ 19.) COO forwarded the email to Appointing Authority’s Office Manager with the request that it be investigated. (FOF ¶ 20.) On May 23, 2013, Office Manager, Appointing Authority’s Fiscal Director (Director), and Montgomery County’s Administrator (Administrator) met with Mr. Oyetayo about the email. (FOF ¶ 22.) Mr. Oyetayo stated that he did not know COO, “did not send the message, and did not know how it got to” COO; however, after checking his computer, he acknowledged “that the message was in his outbox.” (FOF ¶ 23.) Appointing Authority, thereafter, retrieved and reviewed emails from Mr. Oyetayo’s work email address from April 24 to May 20, 2013. (FOF ¶¶ 24-25.)

Appointing Authority’s investigation revealed that, on May 20, 2013, Mr. Oyetayo had seventeen email messages, eight that he sent and nine that he received. (FOF ¶ 26.) Of those seventeen messages: one forwarded an internet link to Mr. Oyetayo’s Gmail account; one was from COO, sent at 10:02 a.m., titled “Election Day Alert”; between 9:25 a.m. and 10:08 a.m. he received seven email messages from his wife and he sent four messages to his wife; and four messages were sent to Mr. Oyetayo’s Gmail account and an email account for Mr. Oyetayo’s personal business, copying his wife. (FOF ¶¶ 26-29.) Between April 24 and May 20, 2013, Mr. Oyetayo’s work email account reflected: (1) an email message to his wife on April 26, 2014, which included promotional flyers for his business; (2) a string of fifteen email messages with his wife between 2:45 p.m. on April 24, 2013 and 12:30 p.m. on April 29, 2013; (3) an email message between Mr. Oyetayo and

³ The body of the email stated “Finding someone better; your ignorance is the problem not the person. Every woman need[s] love no matter who they are[.]” (FOF ¶ 19.)

his wife on May 9, 2013, which included an attachment that had his business letterhead and a promotional flyer; (4) a string of seven email messages with a third party “between 3:54 p.m. and 4:14 p.m. on May 7, 2013,” one of which included copies of round trip airline tickets; and (5) a string of three email messages with the same third party “between 9:40 a.m. and 10:32 a.m. on May 22, 2013.” (FOF ¶ 30.)

Based on the investigation, Appointing Authority charged Mr. Oyetayo with “continued misuse of [Appointing Authority] equipment . . . spending excessive work time with non-work related communications” and removed him from his Accountant I position effective July 1, 2013. (Adjudication at 11; FOF ¶ 1.) Mr. Oyetayo appealed his removal, arguing that Appointing Authority did not have just cause to remove him from his position. A hearing ensued before the Commission.

Appointing Authority presented the testimony of Director, who is Mr. Oyetayo’s supervisor, and Office Manager. Director testified regarding Appointing Authority’s Employee Handbook and what constitutes “acceptable use” of Appointing Authority’s electronic resources. (Adjudication at 12.) Director indicated that, while it is acceptable for employees to use the electronic resources for non-work related matters “in a minimal manner” during their lunch hours and before and after work, employees are prohibited from using those resources to conduct outside business. (Adjudication at 13.) Director also described Mr. Oyetayo’s prior discipline, and presented the May 26, 2011 warning which advised that “[a]ny further incidents of this nature will result in further

disciplinary action up to and including unpaid suspension and or termination.” (Adjudication at 13-14 (internal quotation marks omitted).)

Office Manager described the results of the May 2013 investigation prompted by the email sent to COO from Mr. Oyetayo’s work email address. (Adjudication at 16.) She indicated that all of these email messages were sent after the February 1, 2013 discipline and that she was present when Mr. Oyetayo was removed from his position. (Adjudication at 17.) Office Manager explained that she, Administrator, and Montgomery County’s head of security met with Mr. Oyetayo, presented him with a termination letter, asked him to read the letter, and respond. (Adjudication at 17-18.) According to Office Manager, Mr. Oyetayo stated that he had something to say, but never said anything. (Adjudication at 18.)

Mr. Oyetayo testified that he began working for Appointing Authority in 2002. (Adjudication at 18.) Mr. Oyetayo stated that he did not know COO, but acknowledged that the May 20, 2013 email message was sent from his computer. (Adjudication at 18.) Mr. Oyetayo indicated that he was not made aware of the email to COO until May 24, 2013. (Adjudication at 18.) Mr. Oyetayo acknowledged that he used his work email to send email messages to his wife, but explained that this did not affect his work ethic, he has never failed to complete a work assignment, everyone used the office equipment, and he believed he was being targeted without cause. (Adjudication at 18.) Mr. Oyetayo agreed that his family owns a travel business known as Marjoy Travels and that, on occasion, he has sent emails from work concerning that business, but that he never made travel plans while at work. (Adjudication at 18.)

The Commission reviewed the record and concluded that, while it was undisputed that Mr. Oyetayo used his work email to send and receive non-work related communications, Appointing Authority failed to establish that he spent “excessive work time” on these non-work related communications. (Adjudication at 19.) The Commission noted that the majority of Mr. Oyetayo’s non-work related messages were exchanged with his wife, were very short (most being only a single line), and most were not even complete sentences. (Adjudication at 19.) The Commission did “not find the messages establish that [Mr. Oyetayo] was dedicating excessive work time to these communications” and further noted that none of the messages contained content that was expressly prohibited by the Employee Handbook. (Adjudication at 19.) On this basis, the Commission found that Appointing Authority did not establish just cause for Mr. Oyetayo’s removal. (Adjudication at 19.) With regard to Appointing Authority’s reliance on Mr. Oyetayo’s prior discipline, the Commission held that none of the three warnings Mr. Oyetayo received in a five year period rose above written warnings and that one, the March 2008 warning for “Abuse of Time” because of a late call-off, was related to conduct that was substantially different to that at issue in the present matter. (Adjudication at 19.) The Commission noted that Appointing Authority could have increased the type of discipline for the subsequent infractions if it believed that Mr. Oyetayo’s conduct was egregious enough to support a suspension, but it did not. (Adjudication at 19-20.) For these reasons, the Commission held that Appointing Authority did not meet its burden of proving just cause for removing Mr. Oyetayo from his position. (Adjudication at 20.)

However, while noting that some level of personal use of work resources was permitted by the Employee Handbook, the Commission held that Mr. Oyetayo was not free to send emails involving his outside business using his work email account. (Adjudication at 20.) The Commission found that, while those messages were short and did not require “an excessive amount of work time” to send, there was an “inherent potential for work performance issues when an employee is devoting any work time to a personal business activity.” (Adjudication at 20.) Accordingly, the Commission found that there was good cause for suspending Mr. Oyetayo and, pursuant to Section 952(c) of the Civil Service Act⁴ (Act), modified Mr. Oyetayo’s “removal to a ten-day suspension and reinstatement” with no backpay. (Adjudication at 20.) Appointing Authority now petitions this Court for review of the Commission’s Order.⁵

In support of its appeal, Appointing Authority first argues that the Commission’s findings do not support its conclusion that Appointing Authority lacked just cause for removing Mr. Oyetayo from his civil service position.⁶ Appointing Authority asserts that, because the Commission determined that Mr. Oyetayo used work equipment to conduct personal business for his private travel

⁴ Act of August 5, 1941, P.L. 752, as amended, 71 P.S. § 741.952(c), added by Section 21 of the Act of June 26, 1989, P.L. 47.

⁵ Our review of the Commission’s Adjudication “is limited to determining whether findings of fact are supported by competent evidence, whether errors of law have been committed or whether constitutional rights have been violated.” Ellerbe-Pryer v. State Civil Service Commission, 803 A.2d 249, 253 n.1 (Pa. Cmwlth. 2002).

⁶ We have reordered Appointing Authority’s arguments in the interest of clarity.

business, Appointing Authority established just cause for Mr. Oyetayo's termination. Appointing Authority argues further that the Commission disregarded competent evidence and based its conclusions on wholly arbitrary grounds. Appointing Authority contends that the Commission marginalized the overwhelming evidence and completely ignored the substance and significance of Mr. Oyetayo's personal business emails.

Pursuant to Section 807 of the Act, employees in the classified service may only be removed upon a showing of just cause. 71 P.S. § 741.807. As explained by this Court:

To show just cause for the removal of a regular status civil service employee, the appointing authority must demonstrate that the actions resulting in the removal are related to an employee's job performance and touch in some rational and logical manner upon the employee's competence and ability. What constitutes ample just cause for removal is largely a matter of discretion on the part of the head of the department. However, to be sufficient, the cause should be personal to the employee and such as to render the employee unfit for his or her position, thus making dismissal justifiable and for the good of the service. Whether actions of a civil service employee constitute just cause for removal is a question of law fully reviewable by this court.

Pennsylvania Board of Probation and Parole v. State Civil Service Commission, 4 A.3d 1106, 1112 (Pa. Cmwlth. 2010) (citations omitted).

In arguing that, given the findings of fact, the Commission erred by concluding that Appointing Authority did not have just cause to remove Mr. Oyetayo, Appointing Authority does not address the crux of its charge against Mr. Oyetayo. Appointing Authority charged that Mr. Oyetayo "continued to misuse

[Appointing Authority] equipment spending *excessive* work time with non-work related communications.” (Adjudication at 19 (internal quotation marks omitted) (emphasis added); FOF ¶ 1.) As pointed out by the Commission, there was no dispute that Mr. Oyetayo used his work email for non-work related emails and that some of the email messages sent and received by Mr. Oyetayo involved his personal travel business. (Adjudication at 19.) Considering the substance of the charges against Mr. Oyetayo, the Commission reviewed the email messages and determined that Appointing Authority did not establish that the work time Mr. Oyetayo spent using his work email for non-work related communications was *excessive*. (Adjudication at 19.) The Commission also noted that Appointing Authority’s policy governing the use of electronic resources “permits some level of personal use of the resources.” (Adjudication at 20 n.2; FOF ¶ 13.) Although Appointing Authority believes that the Commission should have given more weight to the substance and significance of Mr. Oyetayo’s non-work related emails, a review of the Commission’s Adjudication shows that it weighed all of the evidence presented and set forth its findings in accordance with the charges as presented by Appointing Authority.⁷ As such, we cannot conclude that the Commission disregarded competent evidence or marginalized the evidence in order to overturn the Commission’s conclusion, based on its findings, that Appointing

⁷ It is well-settled that “[q]uestions of credibility and the weight to be accorded evidence are determined by the [Commission].” Thompson v. State Civil Service Commission, 863 A.2d 180, 184 (Pa. Cmwlth. 2004).

Authority did not establish just cause for Mr. Oyetayo's removal.⁸ Accordingly, we cannot disturb the Commission's findings or conclusions.

Next, Appointing Authority argues that the Commission abused its discretion in modifying Mr. Oyetayo's discipline from removal to a ten-day suspension because the Commission's modification was not appropriate in this case. Appointing Authority asserts that Mr. Oyetayo's use of work equipment to run his personal travel agency, which included making and finalizing travel arrangements for his customers, is indefensible, a dereliction of duty, and touches upon his job performance at the most basic level. Relying on this Court's decision in Davis v. Civil Service Commission of the City of Philadelphia, 820 A.2d 874 (Pa. Cmwlth. 2003), Appointing Authority contends that even when a single instance of misconduct or error of judgment adversely reflects on the fitness of the employee for his duties, an appointing authority has just cause for dismissal. Based on this standard, Appointing Authority argues that this case is akin to this Court's affirmance of the Commission's decision in Ellerbee-Pryer v. State Civil Service Commission, 803 A.2d 249 (Pa. Cmwlth. 2002), to dismiss a correctional officer for failure to comply with a substance abuse program because it affected the terms of her employment. Appointing Authority argues further that it has created a clear and reasonable policy on the acceptable use of its electronic resources that includes termination as the penalty for a violation. Because the Commission ruled that Mr. Oyetayo violated the policy, and given the past progressive discipline

⁸ "[T]his Court will not re-weigh the evidence or substitute its judgment even though [we] might have reached a different factual conclusion." Id.

imposed upon Mr. Oyetayo, the Commission's decision to modify the discipline constitutes an impermissible overturning of proper and appropriate discretion on the part of Appointing Authority. In short, Appointing Authority argues that the Commission abused its power when it modified the discipline after finding that Mr. Oyetayo violated Appointing Authority's policy governing use of electronic resources.

Appointing Authority's argument is another challenge to the Commission's underlying determination that Appointing Authority did not establish just cause for removing Mr. Oyetayo from classified service and that the Commission did not have the authority to modify the discipline imposed. Section 952(c), which authorizes the Commission to modify the action of an appointing authority, provides, in pertinent part:

In the case of any employe removed . . . the commission may modify or set aside the action of the appointing authority. Where appropriate the commission may order reinstatement, with the payment of so much of the salary or wages lost, including employe benefits, as the commission may in its discretion award.

71 P.S. § 741.952(c). Section 952(c) “authorizes the Commission to modify the action of an appointing authority, even where the charges brought against the employee are proven.” Department of Corrections v. State Civil Service Commission, 842 A.2d 526, 532-33 (Pa. Cmwlth. 2004). “A modification that includes reinstatement is limited to circumstances ‘where appropriate.’” Id. at 533 (quoting 71 P.S. § 741.952(c)). Because it is within the discretion of the Commission to modify the action of an appointing authority, we will not overturn a

modification “in the absence of bad faith, fraud, capricious action or abuse of power.” Id. (quoting Bowman v. Department of Environmental Resources, 700 A.2d 427, 428 (Pa. 1997)).

Initially, we note that Appointing Authority’s past discipline imposed upon Mr. Oyetayo was not progressive as asserted by Appointing Authority. As the Commission observed, the prior discipline never rose above the level of a written warning and, if Appointing Authority believed that Mr. Oyetayo’s failure to strictly abide by Appointing Authority’s policy was egregious, it could have increased the discipline to a suspension. Moreover, Appointing Authority did not submit any evidence to establish that Mr. Oyetayo’s use of his work equipment to send non-work related emails affected his work performance or rendered him unfit for his position. As such, the instant matter is distinguishable from our decision in Ellerbee-Pryer.

In Ellerbee-Pryer, a correctional officer was dismissed because she did not complete a substance abuse program after testing positive for alcohol while at work. Ellerbee-Pryer, 803 A.2d at 250-51. The correctional officer was warned “that if she did not successfully complete” the program, or meet the conditions of the program, she would be subject to removal. Id. at 250. Obviously, the correctional officer’s failure to complete the substance abuse program was personal to her and rendered her unfit to perform her duties. Here, the Commission recognized Mr. Oyetayo’s testimony that he never failed to complete any work assigned to him. (Adjudication at 18.) In addition, the Commission determined that Appointing Authority did not establish that Mr. Oyetayo spent an

excessive amount of work time sending emails concerning non-work related matters. (Adjudication at 19.)

The Commission, nonetheless, recognized “the inherent potential for work performance issues when an employee is devoting any work time to a personal business activity.” (Adjudication at 20.) Based on the recognition that such conduct may affect Mr. Oyetayo’s job performance and fitness for the position he holds with Appointing Authority, the Commission determined that Appointing Authority established good cause for a suspension, modified the discipline imposed by Appointing Authority to a ten-day suspension, and reinstated Mr. Oyetayo without backpay. (Adjudication at 20.) The Commission also put Mr. Oyetayo on notice that his conduct at issue here “may result in disciplinary action more severe than a ten-day suspension.” (Adjudication at 21.) Therefore, the Commission did not condone Mr. Oyetayo’s use of work equipment to run his personal travel agency. Moreover, like the employee in Ellerbee-Pryer, if Mr. Oyetayo ignores the Commission’s warning, any future misuse of Appointing Authority’s electronic resources resulting in a violation of its policies may be just cause for removal.

Accordingly, we conclude that the Commission did not abuse its discretion by modifying the discipline imposed upon Mr. Oyetayo.

Finally, Appointing Authority argues that the Commission’s Adjudication is inconsistent and contradictory to a separate adjudication on the same or similar matters. Appointing Authority refers this Court to the Commission’s adjudication in Afrid N. Irani v. Department of Health (Appeal No. 27888, mailed June 12,

2014),⁹ and argues that the Commission concluded, under essentially the same set of facts as in the present case and based on substantially less evidence, that the appointing authority had just cause for removal.

“While an administrative agency is not bound by the rule of *stare decisis*, an agency does have the obligation to render consistent opinions” Standard Fire Insurance Company v. Insurance Department, 611 A.2d 356, 359 (Pa. Cmwlth. 1992) (citation omitted). Moreover, where a board has acted wholly inconsistently with its prior decisions, we have held that the board’s failure “to either explain, distinguish or overrule its prior decisions . . . *under the identical circumstances* . . . constitute[s] a clear error of law.” Gibson v. Unemployment Compensation Board of Review, 682 A.2d 422, 424 n.7 (Pa. Cmwlth. 1996) (emphasis in original).

In Irani, the employee was charged with sending an inappropriate and unprofessional email to a co-worker and for using the appointing authority’s “information technology resources for an excessive amount of personal use.” (Irani, FOF ¶ 1 (internal quotation marks omitted).) The appointing authority had a policy prohibiting excessive use of information technology during normal assigned work hours and the use of internet/email in a manner that inhibited the employee’s job performance. (Irani, FOF ¶¶ 37-38.) The credible evidence presented to the Commission by the appointing authority showed that the employee visited non-work related internet websites several times every day between April 8, 2013 and

⁹ Appointing Authority has attached a copy of this adjudication to its brief as Appendix B.

May 3, 2013. (Irani, FOF ¶¶ 40-50.) The credible evidence also showed that the employee's non-work related internet use *affected his job performance*. (Irani, Adjudication at 27, 29-30.) Given how frequently the employee accessed the internet during the work day, the Commission rejected his testimony as not credible that he was using the internet for work-related matters or that he only used the internet for personal reasons during lunch and breaks. (Irani, Adjudication at 27-29.) The Commission determined that the employee's internet use was not consistent with the appointing authority's policy, that he repeatedly chose not to comply with the policy, and that his choice not to comply compromised his ability to perform his job. (Irani, Adjudication at 29-30.)

Contrary to Appointing Authority's assertion, the facts and circumstances presented in Irani are not identical to the instant matter. Here, based on the substance and frequency of the emails, the Commission found that Mr. Oyetayo's misuse of Appointing Authority's electronic resources was not excessive and, because there was no evidence that it affected his work, it did not interfere with his job performance. To the contrary, in Irani, the evidence presented showed that the employee's use of the internet for personal reasons was excessive and that it did negatively impact his job performance. While the Commission's adjudications should be consistent, the Commission still must conduct a hearing when an appeal is taken by a civil service employee challenging his or her removal, review each case on an independent basis to determine whether an appointing authority has proven just cause for removal, and issue an adjudication with findings and

conclusions. Sections 951¹⁰ and 952 of the Act, 71 P.S. §§ 741.951, 741.952. In rendering its adjudication, the Commission must determine witness credibility and the weight to be accorded the evidence. Thompson, 863 A.2d at 184; Ellerbe-Pryer, 803 A.2d at 254. That is what occurred in this matter and the credited facts are different than in Irani. Therefore, we will not set aside the Commission's Adjudication because Appointing Authority believes the Commission should have weighed the evidence differently because, in a separate and unrelated adjudication, it found that an appointing authority had just cause to remove an employee for excessive internet usage.

For the foregoing reasons, the Commission's Order is affirmed.

RENÉE COHN JUBELIRER, Judge

¹⁰ Added by Section 27 of the Act of August 27, 1963, P.L. 1257, as amended, 71 P.S. § 741.951.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Montgomery County Behavioral	:	
Health/Development Disabilities,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 851 C.D. 2014
	:	
State Civil Service Commission	:	
(Oyetayo),	:	
	:	
Respondent	:	

ORDER

NOW, February 11, 2015, the Order of the State Civil Service Commission, entered in the above-captioned matter, is **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge